In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 493

IRENE ETHEL VINYARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B; R. III, 1–19)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1964 (Pet. App. B; R. III, 1). The petition for a writ of certiorari was filed on September 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record is in three volumes. Volume II is the transcript of the trial.

746-703—64

QUESTIONS PRESENTED

1. Whether evidence of an offer to bribe arresting officers was inadmissible on the ground that petitioner's initial arrest was unlawful.

2. Whether entrapment was established as a matter of law.

3. Whether the fact that petitioner was represented by counsel at the time of the offer rendered inadmissible testimony regarding her statements to the arresting officers.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of unlawfully offering, and giving, a bribe to two agents of the United States Treasury Department with intent to influence the agents in the exercise of their official conduct after they had arrested her for violating the Internal Revenue laws (R. I, 1, 8, 35, 49). Petitioner was sentenced to imprisonment for six months and fined $500 and costs (R. I, 49). The court of appeals unanimously affirmed (R. III, 1–20; Pet. App. B).

The government's evidence may be summarized as follows:

In the early hours of August 10, 1963, Agents Overturf and Wallace of the Treasury Department entered the 61 Lounge in St. Louis, Missouri, which was owned by petitioner (R. II, 20, 114–115). The agents marked for later identification two liquor bottles which were almost empty (R. II, 29–30, 115–116).

Later that morning, the agents returned and observed petitioner carry the marked empty bottles to a rear storeroom and return with them filled (R. II, 27–29, 119–120, 219–220). Agent Overturf arrested petitioner for refilling bottles (R. II, 30, 220). Petitioner was then permitted to call her attorney (R. II, 30–31, 223).

The agents took possession of several bottles as evidence (R. II, 32) and departed with petitioner in the direction of the Federal Building in St. Louis (R. II, 34, 35–37). Agent Overturf and petitioner drove in a government vehicle, and Agent Wallace followed in his private automobile (R. II, 36, 125, 224). En route to the Federal Building, petitioner asked whether there was not "some way we can settle this" (R. II, 37). Overturf told her to have her lawyer contact the United States Attorney and make an offer in compromise in lieu of criminal liability (R. II, 37). Petitioner then inquired whether they could not settle it themselves (R. II, 38), saying, "You give me the whiskey and the papers back and forget about it" (R. II, 38). Petitioner said that "I know you fellows don't make much money and you can sure use the money" (R. II, 38). When Overturf mentioned Wallace, petitioner suggested that Overturf talk with Wallace (R. II, 39). Overturf then stopped the car in a vacant parking lot, and petitioner repeated to Agent Wallace an offer of $500 "to forget about it" (R. II, 128). The agents agreed between themselves to delay until they could notify Inspection Service officials about the bribe offer (R. II, 84, 157, 159).

Upon their arrival at the Federal Building, the agents locked the bottles in the trunk of the government vehicle (R. II, 47, 130–131, 233) on petitioner's suggestion that it was not necessary to take them in the building "if we are going to settle this" (R. II, 47). As required of persons entering the building on a Saturday, Agent Overturf signed an "in-out" form for himself and Wallace (R. II, 89). The agents explained that petitioner was not signed in since it was not customary to sign in prisoners (R. II, 89–92, 164). Petitioner's personal history was recorded (R. II, 47–48, 131–132), and, on petitioner's suggestion that their bargain made fingerprinting unnecessary (R. II, 48), a pretense of taking petitioner's fingerprints was made (R. II, 48, 132). Petitioner was released on her own recognizance (R. II, 48–49).

Shortly after petitioner's release Agent Overturf communicated with Inspection Service officials, as well as others (R. II, 49). The afternoon was spent preparing recording devices under the direction of the Inspection Service (R. II, 172–173). About 5:30 p.m. Overturf called petitioner and asked if she had the money ready and arranged to meet her (R. II, 103–104).

At approximately 8:00 p.m., the agents, after being searched and equipped with recording devices (R. II, 50–52, 135–138), met petitioner at the 61 Lounge and proceeded with her in the government vehicle to a nearby parking lot (R. II, 53–54, 138–139). Petitioner repeated her offer (R. II, 139–140, 252–258) and gave each agent an envelop containing $250 (R. II, 56, 140). Wire recordings of this meeting

were admitted at the trial (R. II, 211). Petitioner was immediately arrested for bribery (R. II, 182).

ARGUMENT

1. Petitioner asserts that all the evidence of her offer and payment of a bribe was inadmissible as the product of an illegal arrest in that the acts for which she was initially arrested did not constitute a crime (Pet. 7). Aside from the fact that, as the court of appeals observed (Pet. App. B, pp. 25–28), the legality of the arrest would not affect petitioner's conviction for bribing the arresting officers, this contention is without merit. In *Wisniewski* v. *United States*, 247 F. 2d 292, the Court of Appeals for the Eighth Circuit held that the statute as then framed did not empower the Secretary of the Treasury to issue a regulation prohibiting the refilling of liquor bottles from other taxed liquor bottles on the ground that it authorized only the issuance of regulations "necessary to protect revenue." Congress almost immediately overruled that decision. The present statute, 26 U.S.C. 5301—which was in effect when petitioner's acts were committed—provides expressly in subsection (c) that it is a criminal offense for any seller of distilled spirits to "place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping * * *." Congress based this amendment on a finding that "it is in most cases impossible, once the container has been refilled * * * to establish whether the tax on the contents of such containers has been lawfully determined." H. Rep. No. 481, 85th Cong., 1st Sess., p. 161; S. Rep. No. 2090, 85th Cong., 2d Sess., pp. 171–172. Petitioner was arrested for the commission of this

statutory offense and the decision in *Wisniewski*, which was explicitly overruled, is totally inapplicable.

2. Relying primarily on the fact that the agents pretended to agree with petitioner between the time of her initial attempt to bribe and the actual payment of the bribe, petitioner argues (Pet. 8–9) that the evidence established entrapment as a matter of law. The agents testified, however, that petitioner initiated the bribe offer en route to the Federal Building. The mere fact that government agents afford opportunity or facilities for the commission of a crime does not establish entrapment. *Sorrells* v. *United States*, 287 U.S. 435, 441. The conflict between the agents' version and that of petitioner was for the jury to resolve. *Sherman* v. *United States*, 356 U.S. 369, 373; *Masciale* v. *United States*, 356 U.S. 386.

3. Petitioner contends that since she retained an attorney to whom she spoke immediately after her arrest for refilling bottles, testimony regarding her statements to the arresting officers, including the original offer and the subsequent, recorded conversation, was inadmissible under this Court's decision in *Massiah* v. *United States*, 377 U.S. 201 (Pet. 9–10). There are several critical distinctions, however, between this case and *Massiah*. First, the statements here were not, as they were in *Massiah*, made after indictment. Second, unlike *Massiah*, petitioner was not deceived as to the identity of the agents and could have insisted on having her attorney present during any conversations with the agents. Finally, the statements made by petitioner were not admissions but them-

selves constituted a totally different offense from that with which petitioner was charged and with respect to which she had retained an attorney. The mere retention of counsel to defend petitioner on the revenue charges did not entitle her to the exclusion of testimony relating to the separate offense of bribery. For unlike the situation in *Massiah*, the agents were not seeking to interrogate petitioner about the offense with which she was charged, and the evidence obtained was not used with respect to that offense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

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